



Commonwealth of Virginia

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

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**STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
ASHTON DEVELOPMENT LLC
d/b/a
HOLIDAY PROPERTIES INC.
FOR
ASHTON DELL SUBDIVISION
VIRGINIA WATER PROTECTION PERMIT NO. WP4-08-0927**

SECTION A: Purpose

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and Ashton Development LLC, regarding the Ashton Dell Subdivision, for the purpose of resolving certain violations of State Water Control Law and the applicable permits and regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "305(b) report" means the report required by Section 305(b) of the Clean Water Act (33 United States Code § 1315(b)), and Va. Code § 62.1-44.19:5 for providing Congress and the public an accurate and comprehensive assessment of the quality of State surface waters.
2. "Ashton Dell" means Ashton Development LLC, a limited liability company authorized to do business in Virginia and its members, affiliates, partners, subsidiaries. Ashton Dell is a "person" within the meaning of Va. Code § 10.1-1400.

3. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
4. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
5. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
6. "Discharge" means, when used without qualification, a discharge of a pollutant, or any addition of a pollutant or combination of pollutants, to state waters or waters of the contiguous zone or ocean other than a discharge from a vessel or other floating craft when being used as a means of transportation.
7. "Dredging" means a form of excavation in which material is removed or relocated from beneath surface waters.
8. "EPA" means the United States Environmental Protection Agency.
9. "Excavate" or "excavation" means ditching, dredging, or mechanized removal of earth, soil, or rock.
10. "Fill" means replacing portions of surface water with upland, or changing the bottom elevation of surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris. 9 VAC 25-210-10.
11. "Fill Material" means any pollutant which replaces portions of surface water with dry land or which changes the bottom elevation of a surface water for any purpose. 9 VAC 25-210-10.
12. "Impacts" means results caused by those activities specified in § 62.1-44.15:20 A of the Code of Virginia.
13. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
14. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
15. "Permit" or "Virginia Water Protection Permit" means individual permit WP4-08-0927 issued under Va. Code § 62.1-44.15:20 that authorizes activities otherwise unlawful under Va. Code § 62.1-44.5 or otherwise serves as the Commonwealth's certification under § 401 of the federal Clean Water Act (33 United States Code ("USC") § 1344.

16. "Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution. 9 VAC 25-210-10.
17. "Pollution" means such alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters: (i) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (a) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (b) the discharge of untreated sewage by any owner into state waters; and (c) contributing to the contravention of standards of water quality duly established by the board, are "pollution." Va. Code § 62.1-44.3; 9 VAC 25-210-10.
18. "PRO" means the Piedmont Regional Office of DEQ, located in Glen Allen, Virginia.
19. "Property" or "Parcel" means the tract of land known as Ashton Dell Subdivision located at 3474 Ashton Dell Lane in Chesterfield County, Virginia.
20. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*
21. "Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions. 9 VAC 25-210-10.
22. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 2.2 (Va. Code §§ 62.1-44.15:20 through 62.1-44.15:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.
23. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3 and 9 VAC 25-210-10.
24. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
25. "TMDL" means total maximum daily load.
26. "USACE" means the United States Army Corps of Engineers.
27. "Va. Code" means the Code of Virginia (1950), as amended.

28. "VAC" means the Virginia Administrative Code.
29. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 9 VAC 25-210-10.

SECTION C: Findings of Fact and Conclusions of Law

1. Ashton Dell controls the 79 acre Parcel known as Ashton Dell Subdivision in Chesterfield County and is developing the Property into a 47 lot residential subdivision.
2. On June 16, 2008, DEQ issued VWP Permit No. WP04-08-0927 to Ashton Dell. The Permit authorized permanent impacts to 0.11 acre of forested wetlands, the permanent conversion of 0.02 acre of forested wetlands to emergent wetlands, and the permanent impact to 38 linear feet of stream.
3. On June 12, 2015, Department staff conducted an inspection of the Property and observed the unauthorized impacts to 2.58 acres of palustrine forested wetlands, 0.70 acre of palustrine open water, and 55 linear feet of stream channel bed were impacted by clearing, dredging, flooding and/or filling.
4. On July 22, 2015, the Department issued NOV No. 15-07-PRO-701 citing Ashton Dell for the unauthorized impacts observed at the June 12, 2015 inspection. Ashton Dell responded to the NOV stating that they believed they had all the necessary approvals and permits in place. In addition, Ashton Dell stated they had a USACE Nationwide 3 permit allowing for the impacts associated with repairing a dam that was on the Property at the time of purchase and in a state of disrepair.
5. On August 19, 2015, the Department held an enforcement conference with representatives of Ashton Dell to discuss the NOV and the issuance of this Order. Ashton Dell stated that the impacts occurred after they were required by Chesterfield County to repair a dam on the property which in turn flooded the upstream forested wetlands. Ashton Dell also reported that they had a USACE nationwide permit to cover the impacts.
6. On December 16, 2015, the Department received a second response to the NOV issued July 22, 2015, with additional information. In the response Ashton Dell stated that "During the course of the project, the area of the pond's existing or potential water surface area created by the existing dam and overflow riser was cleared of inundated vegetation, mostly dead tree snags."
7. On September 12, 2017, The Department met with Ashton Dell to discuss the wetland impacts at the Property. On September 25, 2017, Ashton Dell submitted a written response stating that the pond and subsequent significant alteration of wetlands was permitted by the USACE under Nationwide Permit #3 (NWP#3).

8. The authorization of the dam repair under the NWP#3 was granted by the USACE on November 2, 2006, and was limited to the fill of 0.15 ac of palustrine forested wetlands, 47 linear feet of stream channel, and 0.08 ac of open water for dam repair and two road crossings. NWP#3 allows for the “repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification”. NWP#3 does not provide authorization for the conversion of streams and wetlands to open water, excavation, cutting of trees, or flooding.
9. Va. Code § 62.1-44.15:20(A) states except in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this article, it shall be unlawful to: 1. Excavate in a wetland; 2. On or after October 1, 2001, conduct the following in a wetland: a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; b. Filling or dumping; c. Permanent flooding or impounding; or d. New activities that cause significant alteration or degradation of existing wetland acreage or functions; or 3. Alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board.
10. 9VAC25-210-50 (A) states, “Except in compliance with a VWP permit, unless the activity is otherwise exempted or excluded, no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters, withdraw surface water, otherwise alter the physical, chemical or biological properties of surface waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses; excavate in wetlands or on or after October 1, 2001, conduct the following activities in a wetland:...4. New activities that cause significant alteration or degradation of existing wetland acreage or functions.
11. Part III.Q of the VWP Permit states in part, “Except in compliance with this VWP permit, it shall be unlawful for the permittee to: 1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances... 3. Otherwise alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, to animal or aquatic life, to the uses of such waters for domestic or industrial consumption, for recreation, or for other uses. 4. On or after October 1, 2001 conduct the following activities in a wetland: a. New activities that cause significant alteration or degradation of existing wetland acreage or functions...”
12. Part III.B of the VWP Permit states, “The permittee shall take all reasonable steps to minimize or prevent any impacts in violation of the permit which may have a reasonable likelihood of adversely affecting human health or the environment.”
13. Based on the NOV responses submitted by Ashton Dell and the results of the June 12, 2015, site inspection, the Board concludes that Ashton Dell has violated Va. Code § 62.1-

44.15:20(A), 9VAC25-210-50(A), VWP Permit conditions Parts III.Q, Part III.B as described above.

14. In order for Ashton Dell to return to compliance, DEQ staff and representatives of Ashton Dell have agreed to the Schedule of Compliance, which is contained in Appendix A of the Order.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it in Va. Code §62.1-44.15, the Board orders Ashton Dell and Ashton Dell agrees to:

1. Perform the actions described in Appendix A of this Order;
2. Pay a civil charge of \$38,750 in settlement of the violations cited in this Order. The civil charge shall be paid in accordance with the following schedule:

Due Date	Amount
July 15, 2019	\$4,843.75 or balance
October 15, 2019	\$4,843.75 or balance
January 15, 2020	\$4,843.75 or balance
April 15, 2020	\$4,843.75 or balance
July 15, 2020	\$4,843.75 or balance
October 15, 2020	\$4,843.75 or balance
January 15, 2021	\$4,843.75 or balance
April 15, 2021	\$4,843.75

If the Department fails to receive a civil charge payment pursuant to the schedule described above, the payment shall be deemed late. If any payment is late by 30 days or more, the entire remaining balance of the civil charge shall become immediately due and owing under this Order, and the Department may demand in writing full payment by EPAcoat. Within 15 days of receipt of such letter, EPAcoat shall pay the remaining balance of the civil charge. Any acceptance by the Department of a late payment or of any payment of less than the remaining balance shall not act as a waiver of the acceleration of the remaining balance under this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 1104
Richmond, Virginia 23218

Ashton Dell shall include its Federal Employer Identification Number (FEIN) with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF). If the Department has to refer collection of moneys due under this Order to the Department of Law, Ashton Dell shall be liable for attorneys' fees of 30% of the amount outstanding.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of Ashton Dell for good cause shown by Ashton Dell, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified in Section C of this Order. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, Ashton Dell admits the jurisdictional allegations, and agrees not to contest, but does not admit, the findings of fact, and conclusions of law in this Order.
4. Ashton Dell consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. Ashton Dell declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.
6. Failure by Ashton Dell to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. Ashton Dell shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of

good faith or diligence on its part. Ashton Dell shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Ashton Dell shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:

- a. the reasons for the delay or noncompliance;
- b. the projected duration of any such delay or noncompliance;
- c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
- d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee and Ashton Dell. Nevertheless, Ashton Dell agrees to be bound by any compliance date which precedes the effective date of this Order.
11. This Order shall continue in effect until:
 - a. The Director or his designee terminates the Order after Ashton Dell has completed all of the requirements of the Order;
 - b. Ashton Dell petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or
 - c. The Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to Ashton Dell.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Ashton Dell from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any plans, reports, schedules or specifications attached hereto or submitted by Ashton Dell and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
13. The undersigned representative of Ashton Dell certifies that he or she is a responsible official or officer authorized to enter into the terms and conditions of this Order and to execute and legally bind Ashton Dell to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official or officer of Ashton Dell
14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.
15. By its signature below, Ashton Dell voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 17th day of June, 2019.



Kyle Ivar Winter, P.E.
Department of Environmental Quality
Piedmont Deputy Regional Director

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Ashton Development LLC voluntarily agrees to the issuance of this Order.

Date: 4-16-19 By: *Henry D. Moore*, member
(Person) (Title)
Ashton Development LLC

Commonwealth of Virginia

City/County of Chesterfield

The foregoing document was signed and acknowledged before me this 16th day of

April, 2019, by Henry D. Moore who is

member of Ashton Development LLC on behalf of the company.

[Signature]
Notary Public

320287
Registration No.

My commission expires: 5-31-2022

Notary seal:



APPENDIX A

1. Within 30 days of the issuance of this Order, Ashton Dell must submit to DEQ proposed deed restriction language for protecting the compensation site, and plats of all surface waters and upland areas that are to be preserved in perpetuity within the compensation site boundary. Protection of the compensation site shall run with the land and be documented as follows:
 - a. DEQ shall have **30 calendar days** to review the survey or plat and the deed restriction language. Comments or edits made by DEQ shall be incorporated into the final recorded documents.
 - b. The protective instrument shall use the most current Declaration of Restrictions template provided by DEQ and the U.S. Army Corps of Engineers, and shall be written so that no activity will be performed on the property in any area designated as a compensation site or non-impacted surface water, with the exception of maintenance or corrective action measures authorized by DEQ. Unless otherwise authorized by DEQ, the restrictions apply to ditching, land clearing, or the discharge of dredge or fill material. The protective instrument restrictions shall contain the phrase "ditching, land clearing, or discharge of dredge or fill material" in the limitations placed on the use of these areas. The protective instrument shall be recorded in the chain-of-title to the property on which the compensation site exists. No later than August 1, 2019, Ashton Dell must record a deed restriction on the Property with the Clerk of the Circuit Court of Chesterfield County and provide proof thereof to the DEQ by August 15, 2019.
 - d. No later than 30 days after the recordation of the deed restriction, Ashton Dell must post permanent visible signs, made of metal or plastic, stating "Protected Wetland Areas" which must be conspicuously placed and maintained at every crossing and along the wetland preservation boundary and adjacent boundaries on the Property no more than 200 feet apart.

2. Contact

Unless otherwise specified in this Order, Ashton Dell must submit all requirements of Appendix A of this Order to: Frank Lupini, VA DEQ PRO–Enforcement Division, 4949A Cox Road, Glen Allen, Virginia 23060 or by e-mail to Frank.Lupini@deq.virginia.gov